best difficult to square with the unmodified language of the section. TCI at 71-79. Most significantly, the requirement contained in Section 612(c)(1), that the terms and conditions of leased access arrangements cannot adversely affect the operation, financial condition, or market development of the cable system, may be at odds with any construction of the modified section which would render a "duty to deal" on the part of the cable operator.

A. The Problem of Migration Requires The Maximum Reasonable Rate to Be Set at the Highest Implicit Fee Currently Paid

The migration dilemma was analyzed in depth by leading expert economists.[81] Besen *et al*. "identify a number of adverse effects that excessive reliance on leased access may have on the welfare of the viewing public." Besen *et al*. at 52-53. First, they note that the "substantial capital investments required for the construction of cable systems might not be forthcoming" if cable operators are disabled from selecting the programming carried on their systems. *Id*. at 53.

81 Dr. Besen is a widely recognized expert in this particular area, among others. The seminal economics article on leased access was co-authored by him in 1982. *See* Besen and Johnson, "An Economic Analysis of Mandatory Leased Channel Access for Cable Television" (Rand 1982). He therein concluded, consistent with his conclusions today, that a requirement that cable operators offer nondiscriminatory leased access rates would diminish diversity.

Thus, consumers are hurt when upgrades and additional plant decisions are adversely affected by removing or impairing operator programming choices. Second, a fully distributed cost recovery arrangement, wherein programmers are each required to pay the average costs of the channel capacity they use will diminish diversity on the cable system and nationwide. Id. Niche programming often can support only the marginal cost of the channel used. Common carrier type obligations resulting in average cost pricing plainly preclude these arrangements and diminish the opportunities for niche programming and, therefore, diversity. Id. at 53-54. Third, average cost pricing would encourage migration to leased access channels by programmers now contributing above average costs. Id. at 55. Migration, or even the ability of such programmers to credibly threaten to migrate, can have substantial adverse effects on operators and consumers:

> [G]iven the relatively large number of channels that are provided for leased access in the Cable Act of 1984, if access rates are set too low the negative effects can be large.

Id. at 56. Moreover, because on a typical system a very few programmers generate a much larger portion of the net revenues (and thereby contributing disproportionately to very large portion of the capital costs), "the migration of even a relatively small number of program services to leased access channels will have large adverse effects." Id. at 56-57.

The solution to this substantial legal and policy question is to set the "maximum reasonable rate" at a value equal to the highest implicit fee "paid" by programmers on a particular system. This formula will minimize the potential for harm that would otherwise occur in an environment which encouraged migration. Cable operators and programmers remain free of course to negotiate lower rates, in accordance with the legislative scheme.[82] Moreover, it is predictable that they will do so, just as niche programmers and cable systems today contract for carriage at implicit rates below average costs. Id. at 58.

Some commenters have proposed a variety of other methods of deriving a leased access rate. Typically, these commenters tie leased access rate proposals to their subscriber rate proposal. See, e.g., CFA at 151. The problem with such an approach is that it cannot secure against the problems of migration; if their formulas produce rates sufficiently high to discourage migration, they do so only by coincidence. Moreover, these approaches mix apples and oranges. There is no particular basis for equating reasonable retail prices to end users with transmission rates for programmers.[83]

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82 See Senate Report at 32 ("the operator and the programmer can bargain for a lower rate").

83 See Comments of GTE at 16 ("GTE"). A joint filing by Center for Media Education proposes an astonishing array

(Footnote continued on page 75)

B. The Commission Should Not Construe Section 612 to Impose Billing and Collection Service Obligation and Should Avoid Setting Other Terms and Conditions

A number of comments provide a litany of other terms and conditions which the FCC should regulate under Section 612. Billing and collection, deposit requirements, technical suitability, marketing, channel positioning, part-time vs. full-time options, and day-part differences are proposed to become fair game for regulation, with the cable industry to become an indentured producer, underwriter and guarantor of every new programming whim that comes along.[84] The modifications to Section 612 do not constitute a national endowment for the arts program.

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83 (Footnote continued)

of rates by numerous service category types. Comments of the Center for Media Education, Association of Independent Video and Filmmakers, National Association of Artists' Organizations and National Alliance for Media Arts and Culture at 7-20 ("Center for Media Education"). The numbers are wholly unsubstantiated, as is the general approach. For the FCC to promulgate a detailed set of numbers depending upon the convenience of would-be programmers is wholly misguided, and indeed, in any event would take months if not years of hearings to establish. Because of the patent unconstitutionality and unworkability of the proposal, TCI trusts that it will be summarily rejected by the Commission.

84 See e.g., Comments of the Motion Picture Association of America, Inc. at 5-9; Comments of Fox, Inc. at 4-5; Comments of Community Broadcasters Association at 3.

As already discussed, the statutory scheme expressly envisions negotiation rather than regulation to primarily control the leased access process. It would be incongruous for Congress to have required the price term to be privately negotiated (subject to a regulatory ceiling), but for other terms to be governmentally mandated. Indeed, it is virtually impossible for the FCC to try to regulate every aspect of each leased access contract.[85]

Some commenters have nevertheless tried to cobble together stray pieces of legislative history to create what Congress did not: there is no obligation to provide billing and collection and other ancillary support services. TCI at 74; GTE at 16. There is no doubt that billing and collection was an issue considered by Congress, but the statute itself is clear in not imposing a duty here. Rather, Section 612 as modified permits the FCC to review billing and collection rates where the operator has chosen, in its discretion, to offer such services.

The Commission has already determined that these services are competitively available independent of transmission services: "We conclude that because there is sufficient competition to allow market forces to respond to excessive rates and unreasonable billing practices . . . no

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85 See Comments of Blade Communications, Inc., Multivision Cable TV Corp., Providence Journal Company, and Sammons Communications, Inc., at 22.

statutory purpose would be served by continuing to regulate billing and collection services for an indefinite period."[86] Moreover, no sound policy argument has been proffered to justify the imposition of such a requirement.

Fox, Inc. (along with a largely redundant pleading by its trade association) argues that without billing, collection and marketing obligations, "the lessees must establish its own infrastructure for such functions." Fox at 4. But Fox does not explain why, if this is true, it is of any public interest concern. It explains merely that this would discourage "major programmers" from seeking leased access, and may require them to negotiate affiliation agreements with cable operators. Id. While this may be inconvenient for Fox, there is every reason to believe that it is good for consumers. Fox does not claim to have unsuccessfully tried to negotiate either leased access or affiliation arrangements with cable operators. As discussed above, there are in fact negative consumer effects where a programmer simply tries to use a leased access "threat" to negotiate more favorable terms for voluntary carriage, especially in the case of "major programmers" that would contribute disproportionately to fixed costs recovery.

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86 See Detariffing of Billing and Collection Services, 102 F.C.C. 2d 1150, 1170 (1986) recon. denied, 1 F.C.C. Rcd 445 (1986). The Commission recognized the absence of barriers to entry into the billing and collection market, and that capital costs related to a billing and collection business are relatively low because it is an expense oriented business. Id. at 1170-71.

Whatever ambiguities exist in Section 612, there is no basis for inferring a congressional mandate for mere wealth transfers between program networks and cable operators.

C. Subscribers Should Not Be Forced to Subsidized Nonprofit Programmers' Governmentally-Mandated Lower Rates

Very few of the comments supported the Notice's suggestion that separate ceilings be set for nonprofit organizations, and the little support there was can best be described as lukewarm.[87] CFA, for example, expressed its agreement with lower rates "in principle" but urged the Commission to "carefully review the comments filed by nonprofit programmers in this proceeding to determine if such nonprofit ceilings are necessary." CFA at 152. No such evidence has been adduced here. The silence is telling.

Even those showing some modest support identified numerous problems with the suggestion. CFA also correctly

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87 The one exception appears to be the filing made by Center for Media Education. See discussion note 83, supra. It is unclear whether these entities are arguing for an explicit subsidy for nonprofits. At one point they insist that the rate must be no higher than 1◆, because they can't afford more than that. They later disclaim any intent to force cable subscribers to subsidize these depressed rates, claiming that the cable system's marginal costs will be covered. TCI does not purport to understand how these statements can be reconciled. We simply note that as a matter of economics, if programmers can cover the marginal costs of the additional channel, then cable operators have an incentive to carry them. See Besen et al. at 53-54.

pointed out that using 501(c)(3) status would be unworkably broad, urging that "strict qualifications" would be necessary to identify "those nonprofit programmers who truly need" a subsidy. Id. Most interestingly, CFA here recognized that the money has to come from somewhere, and insisted that cable subscribers not be the source. Id. at 154. Ironically, it suggested that the money be obtained from commercial leased access rates, but again, there is no particular reason to believe that consumers would not eventually bear that burden. Id. The lesson is plain, and at least at the Commission, well-understood: internal, hidden subsidies are bad public policy.[88]

As TCI demonstrated in its comments, there is no particular basis upon which to assume that consumers want nonprofit programming, nevertheless that they should be forced to pay for it (directly or indirectly). The term "nonprofit" may have wholesome connotations, but it covers a wide variety of activity. This includes, inter alia, indecent programming, which Congress has directly legislated against.[89] "Nonprofit" also includes religious programming. There is no insubstantial conflict with the Establishment Clause of the Constitution in

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88 See generally, Kahn, "The Road to More Intelligent Telephone Pricing," 1 Yale L.J. 139 (1984).

89 See Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, MM Dkt. No. 92-258 (rel. Feb. 3, 1993).

promulgating governmental policies underwriting such programs. And finally, in TCI's experience, the term "nonprofit" includes a fair amount of "vanity productions" that may satisfy the particular programmer's parochial needs but do not promote viewer welfare one iota.

The 1992 amendments to the leased access provisions of the Cable Act did not relate at all to the nonprofit programming issue. The Commission should hardly be searching for additional areas to regulate at a time when its resources are so singularly stretched by its statutory obligations. And even if there were available unlimited resources, nonprofit subsidies through lower ceilings would be, simply, a bad idea.

D. Local Governments Are Not Legally Competent to Resolve Leased Access Disputes

A few commenters suggest that local franchising authorities could resolve leased access disputes. There is no basis in the statute for this suggestion. As noted, access obligations imposed locally have their own set of statutory requirements and limits, as set forth in franchise agreements in conformance with Section 611 of the Cable Act. The Commission is the body responsible for adjudicating federal access obligations of Section 612, and cannot lawfully abandon those responsibilities to the local governments. *See* discussion, Section IV(C), *infra*. TCI supports the availability (but not a requirement) for the parties to the dispute to agree to use alternative dispute resolution means as well.

VII. SUBSCRIBER BILL ITEMIZATION

Section 622(c) is a permissive provision that allows a cable operator to identify as a separate line item on its subscriber bill governmentally imposed costs, and sets forth three examples. Act, § 622(c). The fact that the provision uses the term "may" explains that the section is permissive, whether it is followed is at the discretion of the cable operator.[90] Indeed, Senator Lott, the author of the amendment, introduced the language to allow for full disclosure to cable subscribers of the reality that substantial amounts of their cable bills are directly attributed to governmental fees or other charges imposed on them by third parties.[91]

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90 See, 3 Norman J. Singer, Sutherland Statutory Construction, at 7, § 57.03 (5th ed. 1992) ("The form of the verb used in the statute, i.e., something 'may,' 'shall' or 'must' be done, is the single most important textual consideration determining whether a statute is mandatory or directory").

91 In this regard, Senator Lott states:

> The fact is sometimes the rates have gone up because of hidden, unidentified increases in fees or taxes which the cable has to pay and the cable company passes on to the consumers, and it is not explained. So I will have an amendment that will at least say the cable companies can identify on the bills those fees and taxes charged

(Footnote continued on page 82)

As the language is permissive, not mandatory, Section 622(c) should not be read to limit a cable operator's ability to more fully disclose the items factored into consumer cable bills if they so choose. A cable operator should be able to itemize and design its bill as it sees fit. Thus, cable operators should not be discouraged from identifying other governmentally imposed costs, such as retransmission consent fees, on their subscriber bills.

Based on this analysis, TCI strenuously objects to NATOA's suggestion that the Commission require a cable operator to disclose an array of additional costs on a subscriber bill, including "any other items a franchise authority believes are appropriate to itemize," while asserting that costs that are specifically suggested for identification in the Act not be itemized. NATOA at 91-93. NATOA's contention cannot be reconciled with either the plain language or the legislative history of the Act. NATOA's proposals contravene the very purpose of Section 622(c), which was to expose to subscribers the "hidden, unidentified" fees, taxes, and other costs imposed an cable subscribers by governmental authorities. These

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91 (Footnote continued)

> that drive up the rates. At least let the people know. Let us at least have openness in billing.

138 Cong. Rec. § 561, 569, (daily ed. Jan. 29, 1992) (statement of Sen. Lott) (emphasis added).

governmental bodies should not be permitted to escape accountability for additional taxation by hiding these taxes in cable bills.

CONCLUSION

TCI urges the Commission to reintroduce rate regulation of the cable industry in a cautious manner, with ample recognition of the risks inherent in such an endeavor. Because of the considerable risk and uncertainty, TCI also requests that any initial rules developed by the Commission be deemed provisional. Flexible readjustment should be expressly contemplated given that industry normalization will not be achieved for some considerable time in the post-implementation period.

Respectfully submitted,

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